

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

CARROLL COLLEGE

Employer

And

Case 19-RC-165133

**ASSOCIATED FACULTY OF CARROLL
COLLEGE, MEA-MFT, NEA, AFT, AFL-CIO**

Petitioner

DECISION AND ORDER

Petitioner seeks to represent a unit of all tenured and tenure-track teaching faculty employed by the Employer at its Helena, Montana, campus ("Unit"). Carroll College ("College" or the "Employer") makes three primary arguments. First, the Employer argues that it was denied due process under the Board's election rules.¹ Second, the Employer contends that it is not subject to the Board's jurisdiction because it is a religiously operated institution, raising arguments under both *Pacific Lutheran University*, 361 NLRB No. 167 (2014),² and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a)-(b) (2000). Third, the Employer claims that even assuming *arguendo* the Board can exercise jurisdiction in this case, the petition should nevertheless be dismissed because the petitioned-for Unit of faculty are managerial employees, and thus not employees within the meaning of the Act.

A hearing officer of the Board held a hearing in this matter and the parties subsequently filed briefs with me. Based on the record and relevant Board law, I find that the College is not subject to the Board's jurisdiction under *PLU*. Even assuming *arguendo* that the College were subject to the Board's jurisdiction, I must nevertheless dismiss the instant petition, as the Unit sought by Petitioner consists of managerial employees within the meaning of the Act.

I. OVERVIEW AND STRUCTURE OF THE COLLEGE

The College is a non-profit, Catholic, liberal arts college located in Helena, Montana. The College was founded in 1909 by Bishop John Patrick Carroll as an institution of higher learning and seminary for the State of Montana.

The College has a student body of approximately 1,500. The College employs tenured and tenure-track faculty in the petitioned-for Unit, as well as adjunct and other faculty excluded from the Unit.

¹ I must reject this argument outright, as I am bound by Board precedent. Any arguments regarding the lawfulness of the underlying representation case procedures are more appropriately addressed to the Board.

² The College also contends that the *PLU* standard is unconstitutional. However, as noted earlier, I am bound by current Board law and any arguments regarding the constitutionality of *PLU* standard or the correct standard for such cases are more appropriately addressed to the Board.

The Board of Directors (“Board”) is the chief governing body of the College. The Board consists of about 24 members.

Under the Board is the President. The President in turn oversees: the Director of Research, Planning, and Assessment; the Director of Athletics; the Vice President for Advancement; the Vice President of Student Life; the Vice President for Finance and Administration; the Senior Vice President for Academic Affairs and Dean; the Vice President for Community Relations; the Vice President for Enrollment Services; and the Director of Campus Ministry. Of the administrators reporting to the President, only the Vice President for Academic Affairs oversees Unit faculty.

At the faculty level, the College is divided into the following departments: teacher education; life and environmental sciences (including biology, chemistry, and physics); political science (including international relations); engineering, math, and computer science; languages and literature; history; health sciences; nursing; sociology and anthropology; communication studies; anthrozoology; psychology; philosophy; theology; fine arts (including music, visual arts, and theater); and business. The College does not have a seminary. Each department varies in size, ranging from about three to eight faculty members. Each department is headed by a rotating department chair, who in turn reports directly to the Vice President for Academic Affairs.

All Unit faculty participate in the faculty assembly (“Assembly”), whose primary concern is the governance of academic policy and practice at the College. The Assembly generally meets every month during the academic year. The faculty handbook (“Handbook”), discussed in greater detail below, enumerates the full role and authority of the Assembly and the affiliated faculty committees and College committees that are accountable to and/or make reports to the Assembly.

II. THE RELIGIOUS NATURE OF THE COLLEGE

A. Facts

The College’s students, faculty, and staff are “comprised of Catholics, non-Catholics, religious believers, and people who do not hold any particular tradition each contributing their unique gifts to our search for the truth,” according to the website. In fact, the record indicates that slightly over 50 percent of the students identify as Catholic, while the remainder are other religious denominations or declined to state their religious preference.

1. The Mission of the College

The College’s Statement of Mission (“mission”), contained in the College’s Handbook, articles of incorporation, bylaws of the institution, course catalogues, student handbook, and website, details the objectives and philosophy of the College. The mission states that the College is a Catholic, diocesan, liberal arts college in the ecumenical tradition of the Second Vatican Council. According to the mission, the College is dedicated to providing for its students the

means for their full realization of the dual goal of vocation and enlightenment. The mission notes that each student at the College is exposed to value systems, including secular values such as the worth of work and the use of the intellect, humanistic values centering on the uniqueness and dignity of the person, and religious and moral values concerned with one's relationship to God, self, and others.

According to the mission, the College is obligated "to treat judgments concerning ultimate reality and decisions concerning ultimate value at both an academic and pastoral level." This obligation, per the mission, "involves the College's relationship to the Magisterium of the Catholic Church, defined as 'the perennial, authentic, and infallible teaching office committed to the Apostles by Christ and now possessed and exercised by their legitimate successors, the college of bishops in union with the pope.'"³ Thus, the College "is committed to present faithfully within its teaching the magisterial teachings of the Catholic Church." The mission highlights the special role of the theologian, who "makes available to the Magisterium his or her scientific competence, while acting as a mediator between religion and culture by carrying on an academic dialogue with philosophy, science, the liberal arts, the believing community, and secular society."

The mission also notes that, as a college founded by and related to the Diocese of Helena, the College "has a special obligation to provide for the spiritual needs of the college community;" it does not further define the way in which these spiritual needs are met. The mission concludes that in the ecumenical tradition of the Second Vatican Council, the College is committed to a policy of open participation by members of all religious faiths.

As part of the College's accreditation process with the Northwest Commission on Colleges and Universities, the College analyzes mission fulfillment, including through opportunities to learn about Catholic and other faith traditions, opportunities to learn about social justice and engage in service, opportunities for spiritual formation, and partnerships with the Helena Diocese and other faith communities. However, Unit faculty are not required to participate in any of the activities enumerated in the accreditation reports.

2. College Leadership and Administration

a. The Bishop of Helena and College Chancellor

The College is one of eight diocesan colleges in the United States. As a diocesan institution, the College has a direct relationship with the Bishop of the Diocese of Helena ("Bishop"). Under the College's bylaws, the Bishop serves as the chancellor of the College. The Bishop is also a part of the U.S. Conference of Catholic Bishops.

Per the College's Articles of Incorporation, the Bishop, as part of his duties as chancellor, serves as Chairman and voting member of the Board of Trustees ("Board"). The Articles of

³ According to the President, it is unusual that the *magisterium* of the Catholic Church is found in the College's mission, as it is not found in most mission statements of Catholic higher education in the United States.

Incorporation also require the Bishop, as chancellor, to work closely with the Board and the College's President to preserve the Catholic identity of the College, by, *inter alia*, providing assessments and recommendations regarding nominees for the Board; reviewing candidates for the office of President, with the right to remove from consideration the name of any unacceptable candidates before candidates are submitted to the Board for selection; and reviewing and approving prospective appointments to the faculty in the departments of theology and philosophy and the positions of Senior Vice President for Academic Affairs, Vice President of Student Life, and the Director of Campus Ministry. There is no record evidence regarding the way in which the Bishop has, if ever, exercised his right to review and approve appointments to the faculty in the departments of theology and philosophy.

The Articles also state that the Bishop, as chancellor, provides pastoral ministry, care, and support in accordance with *Ex Corde Ecclesia*, a papal document regarding Catholic higher education, including by providing overall responsibility for the pastoral care of the College's students, faculty, administration, and staff; appointing the chaplain of the College; cooperating with the College to provide for effective campus ministry programs; working with the College in the selection of pastoral ministers; and cooperating with the College in ecumenical and interfaith efforts to care for the pastoral needs of students. Finally, the Bishop, in his role as chancellor, is tasked with providing recommendations and assistance to the College in its collaborative efforts with the Diocese of Helena in preparing and educating its present and future leaders.

The Bishop also plays a role with Catholic professors of theology at the College. The College does not require applicants or faculty in the theology department to be Catholic as a condition of employment. If, however, a Catholic faculty member teaches theological disciplines in the College, that faculty member is required to have a *mandatum* granted by the Bishop, which, in essence, is a private agreement between the Bishop and the Catholic theologian that the theologian will teach within the full communion of the Catholic Church. The *mandatum* is not held out or conveyed to the public in any way. The President did not know what, if anything, would happen if a Catholic theology professor failed to get a *mandatum*. The *mandatum* appears to be standard for Catholic institutions of higher education.

b. The President

The College's President is required to be Catholic. The President's areas of responsibility include overseeing enrollment management, financial affairs, academic affairs, community relations, institution advancement and student life, and a chaplain who reports both to the Diocese and the College. The President also testified that one of his major roles is to facilitate the strengthening of the ties to the diocese of Helena and the Catholic Church in light of the College's unique status as a diocesan college and the role the Bishop plays as chancellor of the College.

c. The Board

As noted above, the Chancellor and Chair of the Board is the Bishop. Pursuant to the Articles of Incorporation, three priests also serve on the Board.

d. Funding and Grants

The Diocese of Helena and the Bishop have historically given money to the College. Although the Diocese of Helena is currently bankrupt, it still provides funds to the College for some programming, including campus ministry and engineers without borders. The College also makes donations to Catholic institutions and uses Catholic vendors.

3. College Faculty

a. Hiring

Faculty applicants and faculty are not required to be Catholic. In fact, the President testified that requiring faculty to be Catholic would be antithetical to the College's mission. Moreover, as an equal opportunity employer, the College cannot ask faculty candidates their religion and encourages applications for positions from all qualified persons and employs individuals without regard to race, color, sex, or national origin.

However, the Handbook states that "as a Catholic college with a history and continuing relationship to the Roman Catholic Church and to the Diocese of Helena, the College has had a long-standing policy of seeking to attract and retain on its faculty qualified ordained priests [.] and professed religious," which promotes and maintains the Catholic and diocesan nature. Thus, per the Handbook, the College may accord preference in hiring to qualified ordained priests and "professed religious." There is no other specific evidence about the nature or scope of this practice or how this relates to the College's status as an equal opportunity employer.

The College presented evidence that it is bound to follow *Ex Corde Ecclesia*, a papal document. That document specifies that the number of non-Catholic teachers in the school not be allowed to constitute a majority "in order not to endanger the Catholic identity of the University." Yet it is difficult to see how this is followed, as the President testified that the College cannot ask applicants about Catholic religious affiliation under the EEO policy.

The faculty job postings in the record highlight that the College is an independent, Catholic, diocesan, liberal arts undergraduate college. Several of the job postings note that applicants must provide a written response to the College's mission, discussed in greater detail below. Of the 13 job postings in the record, only the posting for an assistant professor of moral theology mentions Catholicism in any greater detail. This posting additionally states that the College seeks "an enthusiastic, effective teacher who can bring students to understand and appreciate the Roman Catholic tradition and who can contribute to [the College's] mission;" the posting does not mention religious advising or any other religious function.

As part of the hiring process, per the terms of the Handbook, each person being considered for faculty appointment is expected to prepare a written statement reflecting the prospective faculty member's own objectives and goals relative to the mission. The response to

the mission may be used to appraise the applicant's sensitivity and commitment to the mission and goals of the college.

According to the President, the mission response helps ensure that those faculty the College hires will be a "mission fit." Per the President, faculty members are selected in part based on indicated preference for teaching in an undergraduate program at a Catholic liberal arts college.

However, the chair of the honors program and former chair of the political science department testified that, in his five years on hiring committees, the committee sometimes reviews the mission response, but in most cases does not. He further noted that when the mission responses are examined, the committees review them as writing samples. The chair of the department of literature and languages, who has been on hiring committees for about a dozen years, testified that the hiring committee reviews the mission response only for the finalist and is looking for the candidate to reflect an understanding of the College as a small, liberal arts, teacher-centric, and Catholic institution.

For successful applicants, the standard faculty contract requires faculty to abide by the rules and regulations in the Handbook, which by reference incorporates the mission. Otherwise, the contract makes no specific mention of religion or even the mission.

Once hired, new faculty are supposed to, but not required to, attend orientation. Orientation starts with an orientation to the mission, conducted by the Dean of Mission. Faculty may also participate in, but again are not required to participate in, a seven-session orientation to the mission over the course of an academic year.

b. Evaluation and Tenure

The criteria for faculty evaluation, set forth in the Handbook, include teaching with effectiveness, academic advising, professional service to the College community, professional development, and community service. Religion, Catholicism, and the mission do not appear in the parameters for evaluation. The Employer stipulated that faculty are not evaluated on the basis of proselytizing. Moreover, the record contains testimony from the department chair of business, the chair of the honors program and former chair of the political science department, and the chair of the department of languages and literature, each of whom have conducted numerous evaluations of other faculty as part of period reviews. Collectively, their testimony shows that faculty are not evaluated on how they teach in relation to the mission, whether their instruction includes the *magisterium* of the magisterial teachings of the Catholic Church, whether they are serving as religious advisors to students, whether they are propagating Catholic religious tenets, or whether their teaching conforms to Catholic religious doctrine. Student evaluations of faculty also do not include any reference to religion, Catholicism, or religious or spiritual advising.

For promotion to tenure, the Handbook sets forth the sole criteria by which faculty may be evaluated. Spiritual or religious advising and Catholic teaching are not included in these

criteria. The response to the mission submitted by faculty at hiring is not included in the summative file available to the tenure committee for review.

Once granted tenure, all tenured faculty participate in a formative evaluative process that, *inter alia*, assesses the effectiveness of the post-tenure faculty in meeting the College's mission. The Handbook suggests that this assessment of mission effectiveness is maintained in faculty "summative evaluation" files, but provides no other indications as to possible consequences for tenured faculty if they are evaluated as failing to meet to the mission.

c. Discipline and Discharge

The Handbook enumerates the four grounds for termination and dismissal for serious cause. These include professional incompetence, conviction of a felony, "continued serious disrespect or disregard for the Catholic character or mission" of the College, or causing "notorious and public scandal."

The President testified regarding one instance of termination under the "disregard for Catholic character or mission" portion of this provision, which occurred somewhere from 1999 to 2001, prior to his appointment as President. Citing privacy concerns, the President refused to testify to the details of the incident, despite requests from the hearing officer to do so. Instead, the President testified vaguely that this faculty member had consistent and repeated disregard for the Catholic doctrine and teaching to the point that the Bishop and the President at the time needed to remove that individual from teaching at the College. Again, the record contains no documentation or other testimony regarding this discharge, such as discharge documents or other facts relied upon in the decision to discharge this faculty member.

The record contains limited evidence that faculty have been disciplined for acting contrary to the Catholic nature of the College. The sole example given was testimony that sometime in the early 2000s, a faculty member was issued discipline for inviting a Planned Parenthood speaker to campus. Then, as part of the grievance process, the College overturned the discipline because the faculty member in question also had an event panelist speak about Catholic views on the matter. The initial discipline and any subsequent documents regarding the incident are not in the record. After this incident, in about 2006, the Assembly and Board developed a new policy for speakers on campus.

d. Academic Freedom

Academic freedom in teaching, per the Handbook, is fundamental for the protection of the rights of the teacher in teaching and of the student in learning. The Handbook contains extensive details on the College's support for the faculty's academic freedom. The only mention of the mission or Catholicism is: "Respectful of the special aims and objective of Carroll College as described in the Statement of Mission, the faculty member recognizes the responsibility of academic freedom." Faculty may engage in religious research, but there is no evidence that they are required to do so.

e. Religious Advising and Coursework

Faculty engage in academic advising, but not religious or spiritual advising. If a spiritual or religious question arises in the context of academic advising, the faculty member refers the student to campus ministry. There is no mention of religious or spiritual advising in the list of the faculty duties enumerated in the faculty services section of the Handbook or in the academic advising manual for faculty. In fact, when asked by the hearing officer if any of the faculty were required to serve as religious advisors to students, the President merely referenced the terms of the Handbook introduction, which states: "Within the context of the College's Statement of Mission and principally by committee membership, the faculty has a responsibility for general student welfare that extends beyond the purely academic to include a strong dedication to the full human and spiritual development of the student." The record contains no specific indication as to any required religious advising arising out of this broad statement in the Handbook introduction.

Faculty are also not required or instructed to teach the *magisterium*, the magisterial teachings of the Catholic Church, or other specific religious doctrine. However, any faculty member who decides to bring into their discipline Catholic teaching needs to do so faithfully.

Of the Unit faculty who testified in the hearing, only the chair of the theology department indicated that he teaches the *magisterium* and the magisterial teachings of the Catholic Church. The theology professor went to great lengths in his testimony to distinguish the teaching of theology, including Catholic theology, from *catechesis*, which is essentially Sunday school. He testified that theology, while clearly related to the Catholic faith, is not the same as *catechesis* because part of the role of theology is to incorporate a broader sense of dialogue with others, including other forms of thought and even other religions. Thus, per the theology professor, the goal of theology education at the College is not to get all of the students to become Catholic, but rather to be able to understand what Catholicism says, how it works, and what its traditions have been. He testified that, as with any teaching, such as teaching Kant in philosophy, professors must try to be as true to the specific form of thought they are trying to teach, regardless of whether they agree with it. The professor of theology testified that he teaches Christology (the study of the person of Jesus as Christ), church and worship (which focuses mostly on Catholicism), theology and science, liberation theology, and healthcare ethics.

The theology department has two faculty members, as well as another faculty member split between theology and philosophy. There are presently no priests in the theology department, though there have been in the past.

Several aspects of the required curriculum can relate to religion or Catholicism. First, all students must take two theology courses – theology 101 and an upper level theology course on any of a range of topics that are not specific to Catholicism. The syllabi for theology 101 note that the course is an introductory study of Christian theology in the Roman Catholic tradition that allows student reflection on biblical theology, systematic theology, and moral theology. One syllabus highlights that as part of the core curriculum, it is assumed that students come from a wide variety of backgrounds, that "no previous knowledge of Christianity is expected, and all

points of view will be welcome and respected.” Second, students must complete a requirement called the “Great Books of Western Tradition.” To fulfill this requirement, students can choose courses that discuss Catholicism, such as Introduction to the Old Testament, or other classes ranging from ancient and medieval philosophy to Hispanic short stories.

Finally, and most significantly in terms of volume of record evidence, all freshman are required to take an “Alpha Seminar.” The Alpha Seminar’s aim is to introduce students to the key aspects of a Catholic liberal arts education, with a focus on interdisciplinary reading, writing, and discussion skills. Faculty in various departments rotate teaching the Alpha Seminar. Faculty are not required to teach the Alpha Seminar, and the department chair of business was unaware of any business faculty who had taught an Alpha Seminar. The Alpha Seminar faculty become the first-year advisors for the students in their seminars.

While faculty who teach the Alpha Seminar have latitude in their approach to the course, there are generally some common readings for all Alpha Seminars. For example, in fall 2013, common readings were: “What is the What: the Autobiography of Valentino Achak Deng;” mission statements from the College and the College’s center for peace and social justice; “Living Conversation: A Liberal Arts Education in a Catholic Context;” and Martin Luther King Jr.’s “Letter from Birmingham City Jail.” In fall 2014, the common readings also included Malcolm X’s “Learning to Read.” The other readings included by faculty vary widely by department and individual course, as demonstrated by the syllabi in the record. The titles of these other readings do not suggest that they include or reference religion or Catholicism.

The chair of the department of literature and language helped create the Alpha Seminar and was the coordinator of the seminar for about 12 years. She testified that the Alpha Seminar had several purposes, including creating a bonding experience for students in a small class, introducing students to academic work at the college level, and introducing them to the practices and ideas associated with an education at a Catholic liberal-arts college. She testified that the Alpha Seminar was not designed to teach the *magisterium* or the magisterial teachings of the Catholic Church, to propagate Catholic religious tenets, or indoctrinate students into Catholicism. She also noted that the Alpha Seminar faculty, who become the students’ first-year advisors, do not serve as religious advisors.

There is record evidence about the faculty’s role with the mission at a general level. Faculty are supposed to respect the special aims and objectives of the College as described in the mission. For example, if a faculty member is concerned that an academic situation may conflict with the mission, the faculty may, but is not required to seek guidance from faculty counsel and obtain a written opinion on the matter; no such written opinions were entered into the record. The video regarding the College’s mission shows that at least some faculty choose to vocally support the mission. The College contends that faculty work on community service programs, such as Engineers Without Borders, also demonstrates faculty supporting the mission.

f. Other Faculty Religious Activities

The College operates a program where interdisciplinary faculty aid students interesting in joining a religious order. About 17 female students participate in the program to become nuns. The record does not detail the exact role played by faculty in this program, how faculty are held out to the participants of the program, whether participation by faculty is voluntary, or whether participating faculty are evaluated on their performance as religious advisors in the program.

The College also runs a one-week program for high school students called the St. Kateri Institute for Integrative Learning. The Institute's goal is to "encourage high school youth to integrate their faith with their academic pursuits and other endeavors in pursuit of vocational discernment." According to the Institute's grant application, the Institute seeks to introduce participants to the Catholic contemplative tradition of the "Divine Office" and to explore how this tradition can inform academic students. The grant application states that the College's theology faculty have developed a thorough program of theological studies deeply rooted in the Catholic tradition, oriented toward developing a sense of Catholic identity in students by asking them to struggle with scriptural, moral, social, and other fundamental teachings of the Catholic Church. Priests participate in the Institute. Four theology professors helped plan the Institute, and several developed and implemented a 2-hour class session. Course titles include "The Biblical Vision of Creation from Genesis to Revelation," "Caring for God's Creation and the Common Good," and "Be Praised, my Lord, through our sister Mother Earth: What We Can Learn from the Saints about Caring for God's Creation." There is no other evidence suggesting that faculty specifically serve as religious advisors to the high school students during the Institute.

Theology professors are responsible for administering certain grants, including a grant for internship programs for students pursuing pastoral degrees. Again, the record is silent as to whether grant administration in any way requires religious advising to students or whether such duties have any religious, rather than administrative, component whatsoever.

The College presented evidence on additional, non-faculty majority committees. For example, the Spiritual Vitality Committee has worked on highlighting certain aspects of the mission, which included proposals passed by the Assembly and adopted by the Board. There is no evidence of specific committee work tied to religion or Catholicism beyond the mission. Eight of the 28 members of the Spiritual Vitality Committee are Unit faculty. The ad-hoc Committee for Strategic Planning, which includes about half faculty and half administrators, helps develop the College's strategic plan. While part of the College's strategic plan addresses the mission, there is no evidence that any religious function is expected of the faculty in helping to assist with development of the College's strategic plan.

The College advertises certain religious events on campus in which faculty may participate. Each year, the "blessing of the hands" is held for nursing department students and faculty, while a "blessing of the animals" is held with horses and canines for the anthrozoology department. There is no evidence that faculty are required to participate in or play a specific religious role in these events. In fact, the public advertisement for the "blessing of the animals"

states that a friar would be doing the blessings. Participation in other events, such as the “Friends of Francis program” and the “Soup and Substance” luncheons, also appears voluntary and lacking any specific religious advising or function.

Finally, faculty are “strongly encouraged” to attend the Mass of the Holy Spirit at the start of the academic year and the Baccalaureate Mass at the end of the academic year. However, faculty are not required to attend these or any other liturgical celebrations as a condition of employment.

B. Analysis

1. Religious Nature of the College and Its Faculty

a. Legal Standard

In *Pacific Lutheran University*, 361 NLRB No. 167 (2014), the Board adopted a new, two-part standard for determining whether to assert jurisdiction over universities that claim religious affiliation. Under *PLU*, the Board will not decline to exercise jurisdiction over faculty members at a university that claims to be a religious institution unless the university demonstrates that 1) it holds itself out as providing a religious educational environment, and 2) the university holds the petitioned-for faculty out as performing a specific role in creating or maintaining the university’s religious educational environment. *Id.*, slip op. at 6–8.

The Board’s step one is a threshold showing that is “minimal” and “does not impose a heavy burden.” *Id.*, slip op. at 7. To be exempt from the Board’s jurisdiction, the institution must be organized as a nonprofit. *Id.*, slip op. at 7. *See also University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In step one, the Board will give more weight to contemporary self-presentation than to founding and historical documents. *Id.*, slip op. at 7. Documents demonstrating this self-presentation include “handbooks, mission statement, corporate documents, course catalogs, and documents published on a school’s website.” *Id.*, slip op. at 6.

Step two is where the focus of instant inquiry lies, namely on the petitioned-for faculty, rather than the university as a whole. Again, the focus is on how the university *holds out* these faculty, avoiding an intrusive inquiry into the nature of the religious tenets of the institution or how effective the university is at inculcating them. *Id.*, slip op. at 8. For this inquiry, “appropriate evidence to assess this requirement could include, but would not be limited to, job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students.” *Id.*, slip op. at 9. The Board will not look behind such publicly available documents to assess the university’s actual practice or investigate any individual teacher’s specific actions. *Id.*

However, the inquiry is demanding; the faculty must be held out as performing a specific religious function and “[g]eneralized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient.” *Id.*, slip op. at 8. When the Board applied its new standard to the facts of *PLU*, it examined the statement in

the faculty constitution that a faculty member “‘becomes a member of a community of scholars who respect and uphold the principles of Lutheran Higher Education.’” *Id.*, slip op. at 12, n.22. The Board found this statement to be merely aspirational and that it did not demonstrate that faculty members were required to perform any specific religious role. *Id.*

Conversely, evidence showing that faculty members are required to integrate the institution’s religious tenets into coursework, serve as religious advisors to students, propagate those tenets, engage in religious training, or conform to the tenets in a manner specifically linked to their job duties is sufficient to exempt an institution from Board jurisdiction. *Id.*, slip op. at 9. Such evidence will be found in the school’s statements to students, faculty, and the public, including on its website and in its handbooks, employment contracts, and job descriptions. *Id.*, slip op. at 10. The issue boils down to “whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.*, slip op. at 9.

Of significance to the instant case, in footnote 19 of *PLU* the Board noted that it “will decline jurisdiction so long as the university’s public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations.” *Id.* slip op. at 10, n.19. As an example, the Board stated that “if faculty members are subject to dismissal for teaching a doctrine at odds with the religious faith of the institution, [its] new test would lead the Board to decline jurisdiction over disputes about those dismissals so long as the university’s public representations indicated that faculty members were expected to comply with (or at least not openly contravene) certain tenets of a religion as a term and condition of employment.” *Id.*

b. Application

I find that the Board must decline jurisdiction in the instant case, as the College has met both prongs of the *PLU* standard.

Under the first prong of *PLU*, the parties stipulated, and I find, that the College holds itself out as providing a religious educational environment, and thus meets this aspect of the standard.

Under the second prong of *PLU*, although the College does not generally hold out the Unit faculty as performing a specific religious function, it has nevertheless met its burden due to the Handbook’s language regarding discharge for serious cause.

The Handbook enumerates four reasons for which the College may discharge Unit faculty for serious cause, one of which is “continued serious disrespect or disregard for the Catholic character or mission” of the College. Although the evidence in the record is minimal to show that the College has ever discharged a faculty member for this reason, that is irrelevant to the instant inquiry, as the Board will not “look behind” publicly available documents, such as the Handbook, to assess the College’s actual practice. *Id.*, slip op. at 9. The Board in *PLU* contemplated that it will “decline jurisdiction so long as the university’s public representations

make it clear that faculty members are subject to employment-related decisions that are based on religious considerations.” *Id.*, slip op. at 10, n.19. The Board, as an example of this, stated that “if faculty members were subject to dismissal for teaching a doctrine at odds with the religious faith of the institution,” it would decline jurisdiction “so long as the university’s public representations indicated that faculty members were expected to comply with (or at least not openly contravene) certain tenets of a religion as a term and condition of employment.” *Id.* Such is the case here, since the Handbook, which is a public representation of the College, provides for termination for continued serious disrespect or disregard of the College’s Catholic character or mission. Although the Handbook does not specifically state that teaching a doctrine at odds with the religious faith of the institution could lead to discharge, the language of the Handbook is broad enough to encompass terminations for that reason. In sum, given the Board’s language and reasoning in footnote 19 of *PLU*, I must decline jurisdiction based on the Handbook language governing discharge for serious cause for “continued serious disrespect or disregard for the Catholic character or mission” of the College.

However, with regard to other terms and conditions of employment, the record fails to establish that the College’s Catholic nature plays a role in hiring, evaluation, or tenure. The mission’s limited role in the hiring process is akin to the “generalized statements” to support the mission that were found to be insufficient under *PLU*. *Id.*, slip op. at 8. Similarly, while adherence to the mission appears in the hiring process and post-tenure evaluations, there is no evidence of specific impact on Unit faculty’s conditions of employment, and the broad language in and of itself is insufficient to establish the College’s burden under prong two of *PLU*.

The record similarly does not establish that Unit faculty serve as religious advisors to students, propagate religious tenets, or engage in religious training of students. The language referenced by the President, that faculty advising goes beyond academic to include “a strong dedication to the full human and spiritual development of the student,” is vague and does not rise to the level of specifically holding out faculty as religious or spiritual advisors.

Finally, the record fails to establish that Unit faculty are required to integrate the College’s religious tenets into coursework. The only faculty members and related courses that could arguably fall into this category are those in the theology department. However, the testimony of the chair of the theology department establishes the distinction between the teaching of theology at the university level, which is an analytical, academic endeavor, from religious indoctrination found in Catechesis (Sunday School). It is true that the academic teaching of Catholic theology by its very nature must include the study of the tenets of Catholicism. However, even these theology courses dedicated to Catholicism at the College are similar to the study of Catholicism in the theology departments at many universities throughout the country, as the goal is accurately conveying the tenets of Catholicism as such, not indoctrinating students or conveying to them that particular religious perspectives are correct.

To the extent that the College contends that the Alpha Seminar establishes that faculty must incorporate Catholicism into their teaching, I find these courses insufficient to meet prong 2 of *PLU*. The inclusion of a minimal number of mandatory readings relating to Catholicism, such as the College’s mission and “A Liberal Arts Education in a Catholic Context,” in courses taught

by a wide range of faculty who otherwise have extensive discretion over the courses' contents, does not show that the College holds out faculty as performing a specific religious function. This is particularly true where the College also mandates the readings of Martin Luther King, Jr., and Malcom X, as part of the same seminars, thus demonstrating that any Catholic materials are only small portions of the overall coursework.

In conclusion, I decline to assert jurisdiction under *PLU* because the parties have stipulated that the College holds itself out as providing a religious educational environment under prong one and because the Handbook's language regarding discharge for serious cause meets the College's burden under prong two.

2. Religious Freedom Restoration Act

a. Legal Standard

Religious Freedom Restoration Act ("RFRA") provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b) (2000).

"To establish a *prima facie* case under the RFRA's substantial burden/compelling interest/least restrictive means framework, a claimant must show that application of the Act will substantially burden its ability to exercise its sincere religious beliefs." *Carroll College, Inc.*, 345 NLRB 2547, 257 (2005).⁴ "Only if the claimant carries this burden, will the Board, under the RFRA, have to establish that the Act serves a compelling governmental interest and that application of the Act is the least restrictive means of accomplishing that interest." *Id.*

The Board, interpreting applicable Supreme Court jurisprudence, has found that "a substantial burden exists when the Government's regulation puts 'substantial pressure on an adherent to modify his behavior and violate his beliefs.'" *Carroll College*, 345 NLRB at 258 (quoting *Thomas v. Review Board of Indiana Employment Section Division*, 450 U.S. 707, 717-718 (1981)). Under this standard, "the religious adherent has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring the adherent to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." *Ukiah Adventist Hosp.*, 332 NLRB 602, 603 (2000) (citing *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 140-41 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). "This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." *Id.* (citing *Thomas v. Review Bd.*, 450 U.S. 707 (1981)). The Board has made clear that the "substantial burden" inquiry under the RFRA is "plainly different" from an inquiry "under which the Board must

⁴ This is a Protestant academic institution distinct from the College in the instant case.

determine whether an entity is altogether exempt from the Board's jurisdiction," such as under the *PLU* standard. *Id.*

Two Board cases highlight the application of the RFRA to the Board's jurisdiction.

Based on the first prong of the RFRA, substantial burden, the Board similarly rejected an employer's argument under the RFRA in *Carroll College, Inc.*, 345 NLRB 254 (2005). The Board highlighted that "should the petitioner become certified as the collective-bargaining representative of the employer's faculty, the employer will be legally obligated to bargain with the petition in good faith or risk legal sanctions under the Act." *Id.* at 258. However, the Board disagreed with the employer's contention that requiring it to bargain with the union would substantially burden its free exercise of religion because it would interfere with its right to decide autonomously whether faculty members are satisfactorily conforming to the Protestant theological tradition. *Id.* The Board noted that nothing in the record indicated that the employer used any religious criteria in its hiring process or decisions or that faculty members must agree to any particular statements of faith, and that the employer specifically prohibited discrimination in employment decisions based on religion. *Id.* Similarly, the Board found that there was no evidence that a faculty member was ever disciplined, dismissed, or denied tenure, a promotion, or a merit-based salary increase for engaging in conduct contrary to the teaching of the Protestant Church. *Id.* at 259.

More importantly, the Board focused on the fact that the union in that case was not yet certified as the faculty's collective-bargaining representative, and "consequently, no specific religion-based conflicts have emerged." *Id.* The Board highlighted that "hypothetical transgressions advanced by the employer or the mere potential for transgression is not enough to satisfy RFRA's substantial burden component." *Id.* Rather, "the burden must be a 'demonstrable reality,' not merely a speculative possibility." *Id.* (citing *Beck v. Washington*, 369 U.S. 541, 558 (1962)). In fact, the Board likened the employer to any other employer subject to collective-bargaining obligations, in that "the collective-bargaining process will undoubtedly result in some impact on the employer's operation [. . .] but] does not, however, in and of itself, substantially burden the employer's free exercise of religion. *Id.*

Under the second prong of the RFRA, the Board in *Ukiah Adventist Hosp.*, 332 NLRB 602 (2000), found that the assertion of jurisdiction did not violate the RFRA or the First Amendment. In *Ukiah*, the Board considered arguments raised by a hospital operated by the Seventh Day Adventist Church, a church which, according to the hospital, prohibits its members from participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions. *Id.* at 603. For the purposes of its decision, the Board assumed that asserting jurisdiction over the hospital created a substantial burden on the free exercise of religion within the meaning of the RFRA.

However, in analyzing whether the assertion of jurisdiction was the least restrictive means of furthering a compelling governmental interest, the Board found that asserting jurisdiction over the hospital was not precluded by the RFRA. "The Board and the courts have found that the government has a compelling interest in preventing labor strife and in protecting

the rights of employees to organize and bargain collectively with their employers over terms and conditions of employment.” *Id.* As the Board noted, the “right of employees to self-organize is constitutionally protected; it is a fundamental right implicit in the First Amendment’s free assembly language.” *Id.* (citing *Shelton v. Tucker*, 364 U.S. 479, 485-487 (1960)). The Board found that “applying the Act to the [hospital] is the least restrictive means of furthering the government’s compelling interest of preventing labor strife and protecting the employees’ ability to exercise their rights under Section 7 of the Act.” *Id.* at 605. The Board highlighted that it was “mindful that Congress and the courts have been sensitive to the needs flowing from the Free Exercise clause, but every person cannot be shielded from all burdens incident to exercising every aspect of their right to practice religious beliefs.” *Id.* “Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature, and that to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.” *Id.* (quoting *U.S. v. Lee*, 455 U.S. at 259). “Granting an exemption” to the employer “would defeat Congress’ intent in enacting the National Labor Relations Act, by denying many thousands of employees the opportunity to self-organize and choose bargaining representation.” *Id.*

b. Application

I find that the College has not met its burden of establishing that the exercise of jurisdiction would run contrary to the RFRA.

The College has not established that a “substantial burden” within the meaning of the RFRA exists, in that it has failed to show substantial pressure on it as an adherent to modify [its] behavior and violate its beliefs or any specific interference with a tenet or belief that is central to the College’s religious doctrine. The College raises several primary arguments with respect to the “substantial burden” prong of analysis under the RFRA,⁵ which I reject.

First, the College contends that I should read the Board’s standards to find that the College meets its burden under the RFRA if it uses “any” religious criteria in its hiring or if faculty members must agree to “any” statement of beliefs. In making this argument, the College emphasizes that requiring faculty applicants to respond to the mission statement meets this burden, as does the provision in the Handbook that allows the College to terminate faculty for serious disregard for the Catholic character or mission of the College. This argument seems somewhat conflated with the argument under *PLU*, as under the RFRA the concern is whether the College can show substantial pressure to violate its beliefs or interference with a belief central to the College’s religious doctrine. I find that the College has not established that faculty applicants’ mission response statements show the use of religious criteria in hiring. In fact, the faculty on hiring committees consistently testified that the mission response was *not* used for any religious purpose, if it was considered at all. The College’s equal employment hiring policies similarly demonstrate that religion is not, and cannot be, a factor in hiring. More importantly,

⁵ Although I have considered all of the College’s arguments in reaching my determination that the College’s claim fails at the first prong of the RFRA, I will address only its most compelling arguments in this section.

even assuming that the College's contentions regarding religion and hiring were supported by the record, these do not, in and of themselves, show either substantial pressure on the College as an adherent to modify its behavior and violate its beliefs or any specific interference with a tenet or belief that is central to the College's religious doctrine.

Second, the College argues that, unlike in *Carroll College* where the Board found that the employer was unable to present evidence that any adverse action was ever taken against a faculty member for advocating ideas contrary to Christianity or the church, the College has demonstrated that it has terminated a faculty member for "continued serious disrespect or disregard for the Catholic character or mission" of the College. This argument must be rejected, as the record does not conclusively establish the termination of a faculty member for this reason. Rather, the record shows that the President testified that a faculty member was terminated for "continued serious disrespect or disregard for the Catholic character or mission" of the College. However, the College has failed to present any specific evidence or details to corroborate this broad, and crucial, assertion. Without detailed evidence, I cannot find that the College has established a "substantial burden" under the RFRA.

Finally, the College recognizes that the Board will not consider "hypothetical transgressions" that could arise out of collective-bargaining obligations, but nevertheless suggests that "the Region should choose a different tack," essentially arguing that Board precedent is wrong. The College contends that even assuming the precedent in *Carroll College* should be applied, the College has nevertheless met its burden under that precedent, as "any request the prospective union might make – from changes to the termination policy to the brand of soft drink dispensed in the faculty lounge – could potentially implicate [the College's] religious practice." Other examples of collective-bargaining conflict cited by the College throughout its brief are similarly distant and hypothetical possibilities. These are the types of "hypothetical transgressions," which even the College admits have not yet occurred nor are imminently about to occur, that the Board has dismissed in *Carroll College*. To the extent that the College disagrees with this standard, it is for the Board, not me, to revisit. In light of the standard by which I am bound, I find that the College has failed to meet its burden of establishing that a "substantial burden" exists under the RFRA.

Even assuming *arguendo* that the College did meet the "substantial burden" prong of the analysis under the RFRA, its RFRA claim would nevertheless fail. Any possible burdens at issue in the instant case in no way compare to the burdens at issue in *Ukiah Adventist Hospital*, where the very tenets of the religion in question opposed unionization. Since the Board in *Ukiah Adventist Hospital* nevertheless found that asserting jurisdiction was the least restrictive means of furthering a compelling governmental interest, the same interest at issue here, the same would be true in the instant case even assuming that the College did meet its necessary burden.

In sum, the RFRA does not preclude the assertion of jurisdiction in the instant case.

III. MANAGERIAL INDICIA OF FACULTY

A. Facts

1. Primary and Secondary Areas of Faculty Decision Making

The Assembly and related committees serve as the primary decision-making mechanism for Unit faculty. All Unit faculty are required to participate in the Assembly, which meets about once a month during the academic year. The Assembly currently consists of about 90 faculty members with votes and six administrators.

The chair of the Assembly, who is a Unit professor of computer science and who has been the Assembly chair for over 15 years, runs the Assembly meetings. The chair, along with four other faculty members, make up the Agenda Committee, which sets the agenda for the Assembly meetings. For any issues that require a vote, there is a discussion at one Assembly meeting, and a vote at the next.

The Handbook, any and all changes to which must be adopted by the Assembly, sets forth the roles and responsibilities of faculty, the process for faculty governance through committees, and the academic function of the College's operation. Each committee has its own purview, discussed in detail below, and makes decisions that may get sent to the Assembly, and possibly the Board, for approval before being implemented by the College.

The record contains mixed evidence about what items passed by the Assembly and the related committees require approval by the Board. The Handbook states that the Board has final determination over matters decided by the Assembly that are of major concern to the College, matters where the competence and action of the Board is required, and proposed changes in the stated policy or practice of the Handbook. The Handbook also notes that the President decides what requires approval by the Board. However, in contrast to the Handbook language, the President testified that Board approval requirements are spelled out by different committees, and did not personally know what did and did not need to be sent to the Board. The President did recall that the Board must approve rank and tenure decisions, as well as curriculum committee decisions on new courses and new majors. Conversely, the Assembly chair testified that with the exception of individual courses, which do not come before the Assembly, essentially everything else that comes to the Assembly goes on to the Board, which has the right to review any Assembly actions.

If the Assembly approves items that need Board approval, the Vice President for Academic Affairs works collaboratively with the chair of the Board's subcommittee for academic affairs. The Assembly chair is also an ex officio member of the subcommittee. Once the Board's subcommittee reviews the item, it is passed along to the full Board with a recommendation of approving or denying it. The subcommittee meets three times per year.

The Assembly chair estimated that, for the 15 years of his tenure as Assembly chair, about six items per year are approved by the Assembly and then also approved by the Board.

The Assembly chair testified that most of the time the Board approves the Assembly's recommendations. Out of the 90 or so items sent to the Board during this timeframe, the Assembly chair could only think of three examples, discussed below, where the Board did not approve the Assembly's recommendations. Although there is limited evidence on the nature and scope of any independent review by the Board, the Assembly chair testified that he assumed the Board conducted independent review of issues.

i. Academic Programs

The Curriculum Committee addresses curriculum proposals, including addition or deletion of core curriculum courses, majors, minors, and certificate programs. Four of the eight members of the Curriculum Committee are Unit faculty.

If the Curriculum Committee wishes to add or delete programs or majors, the recommendation must go to the Assembly, to the Vice President of Academic Affairs, and ultimately to the Board for final approval. One witness testified to being unaware of any major that the Board did not approve, but there was no evidence of how many majors had been proposed during the tenure of the witness in question. Conversely, there is evidence that the Board wished to add a new athletic training major, but the Curriculum Committee did not approve the major and the Board did not have the authority to implement the major independently. In the same regard, in about 2000, the Board requested that the Assembly consider establishing an ROTC program at the College. Shortly thereafter, the Board independently passed an ROTC proposal. Then in 2001, the Assembly discussed the fact that the ROTC program did not go through proper channels, as it should have gone through the Curriculum Committee and the Assembly, not the Board. Accordingly, the Assembly voted down the ROTC proposal in order to send a message that faculty were unhappy about it not having gone through the appropriate protocols. The Assembly chair also recalled that the ROTC program was one instance in which the Board sent back the Assembly's proposal for further deliberation. Moreover, the department chair of business testified that while the Handbook states that faculty determine what majors are offered by the College, about four years ago the academic dean instructed the department to create a finance major, despite the fact that the business faculty did not wish to do so. In response to this direction, the department came up with a list of courses for the major, which then went to the Curriculum Committee, Assembly, and Board for approval. The Assembly chair testified that 15 to 20 years ago, the Board rejected a health information systems major approved by the Assembly.

Unlike majors and minors, the Curriculum Committee added a certificate program in geographical information systems with approval by the Assembly, but without being subject to final approval from the Board. The College highlights that certificate programs bring in additional income through supplemental enrollment and tuition of non-degree students. The tuition rate is discounted for non-degree students, but there is no evidence of how that tuition rate is set or, of note, whether faculty or committees were involved in setting the rate.

Similarly, if the Curriculum Committee wishes to make any alterations to the College's core curriculum, those changes must also go to the Assembly, to the Vice President of Academic

Affairs, and ultimately to the Board for final approval. Minor adjustments to the curriculum, such as items not part of the core curriculum, do not require Board approval. Additionally, a new course can be offered two times as a special topic with only the approval of the department chair and the Vice President of Academic Affairs; after that, the course requires Curriculum Committee approval. One example of this is the entrepreneur in residence program, which was proposed by an outside entrepreneur, rather than faculty, and is now taught by the entrepreneur as a one-credit “special topics” class that has not yet required committee approval.

The Core Committee, which is made up of a majority of Unit faculty members, is responsible for the ongoing assessment of the core curriculum, the approval of courses that meet the goals of the curriculum, and making recommendations for changes to the core curriculum to the Curriculum Committee. If a department believes that a certain course should fulfill a core requirement, that issue can be handled autonomously by the Core Committee. Like with the Curriculum Committee, major matters recommended by the Core Committee are sent to the Assembly for approval, though the record does not detail what constitutes major matters. Sometimes, such as if the Core Committee recommends an overhaul of the entire core curriculum, the issue must go to the Board for final approval. The record does not elaborate on the nature of the independent review, if any, conducted by the Board in such circumstances.

ii. Enrollment Management

The admissions department determines whether students are admitted to the College. Neither the Assembly, faculty committees, nor individual faculty determine the size or makeup of the student body or any admissions standards for incoming students.

The Vice President of Enrollment Management nevertheless testified that Unit faculty affect enrollment management. As an example of this, the Vice President testified that when faculty decide to give advanced placement to students who have scored well on entry tests, this impacts the ability of the college to retain good students. The Vice President also testified that faculty have involvement in review of certain scholarship applications, which helps the College to be competitive in the marketplace for higher-education and attract higher quality students. The College also highlighted that the anthrozoology department set the incoming freshman class size for its department. Although the College contended that this departmental limitation impacts enrollment, students can become anthrozoology majors only once already admitted to the College.

iii. Finances

The Board sets tuition rates. Ninety percent of the College’s revenue is generated by tuition. The College’s budget for the fiscal year is approximately \$34 million, excluding about \$18 million in financial aid. Approximately 59 percent of the College budget is dedicated to salary and benefits for faculty, administration, and staff of the entire College, about 45 percent of which is faculty.

The Budget Committee is advisory to the President, not the Assembly, and makes recommendations for preparation and implementation of the budget. Of the 17 members of the Budget Committee, there are only three Unit faculty, who are also members of the Faculty Welfare Committee, discussed below.

At the departmental level, department chairs, who are Unit faculty generally serve on three-year rotations based on appointments by their respective departments, make determinations about how to spend certain funds allocated to their departments. Department chairs have independent authority to move funds from one budget line item to another, with the exception of salary. However, faculty salary makes up the vast majority of the departments' operating budgets and is thus not a discretionary budget item. For example, the business department has about \$7,700 in discretionary funds; the political science department has about \$3,200 in discretionary funds (about one to three percent of its total operating budget); the department of languages and literature receives about \$9,000 for the English side of the department and about \$4,000 for the language side of the department's discretionary funds (about one to three percent of the department's total operating budget); and the honors program has about \$4,300 in discretionary funds (about ten percent of the department's total operating budget).

In addition to standard departmental budgets, departments also receive a \$5,000 recruitment budget for new faculty, which is absorbed into the departmental budget each year and can be used discretionarily if funds remain.

The Faculty Development Committee, which primarily, as discussed below, makes decisions about Unit faculty tenure, oversees the allocation of faculty development funds (about \$80,000) used for the faculty retreat. The committee determines the spending of this money at the committee level without outside oversight or approval.

Faculty and departments can also apply for outside grants. One such example is a chemistry department grant, which impacted physical classrooms and computer labs.

iv. Academic Policy

The Handbook, which is approved by the Assembly and the Board, governs general academic policy and numerous other matters. The record does not detail the nature and scope of any independent review conducted by the Board regarding changes to the Handbook recommended by the Assembly.

The Policy Committee studies academic policy issues and reports on any proposed changes in them to the Assembly. Four of the ten committee members are elected faculty members. Amongst other matters, the Policy Committee has proposed changes to the grading scale and policies regarding college-level credit for high school courses, such as advanced placement and international baccalaureate coursework.

Although the Policy Committee is minority faculty, the record contains several specific examples of its proposals going through the Assembly, which is vast majority faculty. First, as

part of an ongoing discussion about concerns from faculty and the athletic department about the high number of absences and struggle to meet academic requirements for student athletes, the Policy Committee conducted a faculty survey on the matter. Then, the issue went to the Assembly, where it was discussed extensively and sent back to the Policy Committee on several occasions for further review. Eventually, the Assembly approved a new policy entitled “Attendance Policy Addressing Absences due to College Sanctioned Activities;” this policy did not go to the Board. Second, the Policy Committee proposed, and the Assembly approved, the academic integrity policy. Third, the Policy Committee proposed a waiver of core requirements for post-bac students who already possess a bachelor’s degree. The Assembly approved this waiver of requirements, but the record is silent as to whether this was approved by or needed approval by the Board. According to the Handbook, approval by the Assembly constitutes a recommendation of the matter to the Vice President of Academic Affairs; however there is no evidence about the nature or scope of any independent review by the Vice President of Academic Affairs. Academic policies are not generally sent to the Board.

The Curriculum Committee, discussed above, also handles the College’s syllabus policy, though the record does not detail the scope of this particular responsibility.

The Institutional Review Board (“IRB”) is a majority faculty committee obligated by federal regulations to provide oversight for research that may involve human participants to ensure that they are dealt with in an ethical and moral manner. Generally, the IRB makes its own decisions. However, for larger policy issues, proposals go from the IRB, to the Policy Committee, to the Assembly; though the record is not completely clear, it does not appear that Board approval is required.

The Program Review and Assessment Committee establishes guidelines for comprehensive review for academic and administrative units and provides guidance for student outcomes assessment throughout the College. This is only a review body, not a policy making or deliberative body. Four of the eight members are elected faculty members.

The Assembly also has authority to make determinations regarding outside speakers and academic freedom. The only record evidence on this matter, discussed in greater detail above, relates to the outside speaker policy passed in about 2006, in which the versions passed by the Assembly and the Board differed as to academic freedom.

v. Personnel Policy and Decisions

Salary and Benefits

According to the Handbook, faculty salaries are determined by the Board in consultation with the President, Vice President for Academic Affairs, the Budget Committee, and the Faculty Welfare Committee. Plus, the Vice President for Academic Affairs has the discretion to offer a discipline-specific salary differential under certain circumstances.

The Faculty Welfare Committee, per the Handbook, addresses salary and benefits, and is the formally recognized body for negotiating these issues with the College administration. Significantly, the committee does not have the authority to set salary. One of the committee's faculty members testified that the committee does not set salary and benefits for faculty, nor does the administration ask for its recommendation regarding salary and benefits for faculty. Rather, the record reveals that the committee's role is to monitor the market-based salary matrix for faculty, which it does by comparing and determining market salaries. The Faculty Welfare Committee also addresses other benefits. For example, the committee recommended that dependents of eligible retirees be granted a tuition benefit. Both the Assembly and Board approved the additional retiree benefit, but there is no detail as to the nature or scope of any independent review conducted by the Board. Similarly, the committee presented a resolution on tuition discount rates, such as scholarships, which then went to the Assembly and Board for approval. The record again lacks evidence on deliberation at the Board level. The Faculty Welfare Committee consists of six faculty members. Three members of the committee are selected to serve as faculty representatives to the Budget Committee.

The Compensation Task Force is a group of faculty, staff, and administrators who were assigned by the President and elected by their peers to review and make recommendations regarding the salary system. There are three Faculty Welfare Committee members, who are Unit faculty, three staff advisory committee members, and three members of the administration. Although not a majority faculty committee, the record shows that matters from the Compensation Task Force progress to the Assembly for consideration and approval. For example, the Compensation Task Force presented compensation data and proposals to bring all faculty to at least 85 percent of salaries in target markets to the Assembly, which adopted the recommendation. The Board subsequently adopted the recommendation as well, but again the record is void of specific details regarding the nature or scope of independent review by the Board.

The Healthcare Task Force was in charge of analyzing and proposing to the President the best means of providing health benefits at the College. The Healthcare Task Force was made up nine members, consisting of three Unit faculty, two administrators, three staff, and an outside consultant, appointed by the President.

Hiring, Rank, and Tenure

The department chairs lead the hiring process for new faculty in their respective departments. Prior to starting the hiring process, the department chair typically checks in with the Vice President of Academic Affairs to obtain hiring permission. This is because when a faculty member leaves or retires the College can, without the consent of the department, remove the funding for that position in lieu of hiring a replacement. However, the Vice President of Academic Affairs generally gives permission for hiring. The record does not contain specific evidence on how frequently the Vice President of Academic Affairs rejects departmental requests for hiring authority. Faculty selected for hire by departments must ultimately be approved by the College's administration, though the record evidence fails to specify whether department selections for hire are ignored or overturned.

Department chairs are responsible for hiring adjuncts in consultation with the College's administration. Department chairs have the authority to elect not to renew a contract for an adjunct without approval or oversight from the College. Compensation for adjuncts comes from a separate budget line item dedicated to adjunct salary, which is not discretionary. In the department of literature and language, for example, there are usually about eight adjuncts teaching in any given semester.

The Rank and Tenure Committee makes recommendations to the President regarding Unit faculty evaluation, promotion, and tenure. Eight of the nine members of this committee are Unit faculty, usually senior faculty. The ninth member of the committee is the Vice President for Academic Affairs, who, under the Handbook, retains the right to submit a separate administrative recommendation to the President. The Handbook, which again must be approved by the Assembly, enumerates the requirements for evaluation and tenure. As an advisory committee to the President, the Rank and Tenure Committee makes a recommendation to the President, who then determines whether to forward the recommendation to the Board for a final decision.

Three to four faculty members get tenure every year. However, the record contains limited evidence of any independent review or reversal of the committee's recommendations by the President or the Board. The President testified that he does not know the criteria for promotion and tenure; rather he just receives letters from the committee and passes them along to the Board. While the President could have access to the tenure files, he testified that he does not "prod" into them, as it would be disrespectful of faculty. With regard to Board approval of tenure, the record contains vague evidence regarding what seem to be two separate instances where the Board did not agree with the committee's recommendation. In one, the Board asked for a deferral of a promotion to tenure that the committee had recommended. In the other, the committee and the Vice President of Academic affairs made conflicting recommendations regarding the appropriateness of tenure, and the Board declined to authorize tenure. Neither example includes specific evidence of independent review by the Board.

The Faculty Development Committee, which consists of six Unit faculty members, plays two roles in this decision-making area. First, the committee makes recommendations concerning ways to improve faculty effectiveness and methods for funding academic conferences and study opportunities. Second, the committee makes recommendations on Unit faculty sabbaticals to the President. The requesting faculty member initially asks the department chair, who in turn writes a letter to the committee indicating whether the requesting faculty member can go on sabbatical and any budget implications. The evidence shows that the President always approves recommendations for sabbatical, and does not conduct an independent review prior to approval.

Discipline and Discharge

Under the Handbook, if there is reason to dismiss a faculty member for cause, the Vice President of Academic Affairs and two members of the Rank and Tenure Committee attempt conciliation. If that fails, then the Rank and Tenure Committee conducts a hearing and presents its recommendations to the Vice President and the accused faculty member. The faculty member

has the right to appeal to the President. The final decision for dismissal must be made by the Board. The record does not contain extensive evidence regarding discipline discharge.

Additionally, the Handbook states that if any faculty member feels there is cause for grievance in any matter not covered by the procedures described in the Handbook, the faculty member concerned may petition the Faculty Welfare Committee, which has the right to decide whether or not the facts merit a detailed investigation. The Faculty Welfare Committee seeks settlement satisfactory to the parties, or, if settlement is not possible, makes a report of its findings.

2. Other Faculty Responsibilities

The Agenda Committee is responsible for the preparation and distribution of the agenda for the Assembly, overseeing the process of updating the Handbook, and distributing revisions. This committee is composed of the chair and vice chair of the Assembly and three faculty members.

The Faculty Council is an advisory body to the President on “all matters which may concern faculty,” and is a forum to openly and confidentially discuss issues of concern for the faculty, as well as for the President to bring issues and matter that concern him to the Council and seek advice. Six of the seven members of the Council are tenured, full-time faculty. In about 2007, the Council established procedures for faculty evaluation of all senior administrators, which the President approved without any changes. However, the record shows that these evaluations of senior administrators pursuant to this policy likely occurred only once, or in any event occur infrequently.

The NWCCU Accreditation Committee provides guidance and recommendation concerning college accreditation. The committee sends a report to a regional governing body that, amongst other things, evaluates the College. Three of the ten committee members are faculty members.

B. Analysis

1. Legal Standard

In *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the Supreme Court has held that faculty members who effectively determine curriculum, grading systems, admissions, tuition, matriculation standards, academic calendars, and course schedules through faculty-wide meetings and faculty committees are managers excluded from the Act’s coverage. The Court cautioned that not all professors are managers, and professors may not be excluded from a bargaining unit merely because “they determine the content of their own courses, evaluate their own students, and supervise their own research.” *Id.* at 682.

In *Yeshiva*, collegial bodies of faculty had extensive authority over curriculum, academic calendars, course schedules, grading policies, teaching methods, admission and matriculation standards, and admissions, retention, and graduation of individual students. *Id.* at 686. The faculty bodies also sometimes set tuition and enrollment levels and made budget requests that were followed. *Id.* The Court therefore considered the Yeshiva faculty to be managerial, and it stated that the sharing of management of the university between the administration and the faculty was “typical.” *Id.* at 680.

However, the Court in *Yeshiva* did not provide an analytical framework for deciding what areas of faculty decision-making should be considered or given what weight or for assessing when their control over a given area was effective. The Board in its numerous cases applying *Yeshiva* examined numerous decision-making areas without specifying their relative significance. *See, e.g., Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

In *Pacific Lutheran University*, 361 NLRB No. 157 (2014), the Board set out a framework for assessing faculty managerial status pursuant to *Yeshiva*.⁶ The Board in *PLU* left untouched the longstanding allocation of the burden of proof of managerial status; that burden lies with the party asserting managerial status. *Id.* at 17 n.33. First, decision-making authority that affects the university as a whole is most suggestive of managerial status and it is therefore this type of decision-making that will weigh most heavily in Board analysis. *Id.*, slip op. at 16. Second, the Board organized faculty decision making into five areas, of which three affect universities as a whole and are therefore primary, while two do not affect universities as a whole and are therefore secondary. *Id.*, slip op. at 17–18. The primary areas are academic programs, enrollment management, and finances. *Id.* The secondary areas are academic policy and personnel policy and decisions. *Id.*

For academic programs, the Board found that “this decision making area covers topics such as the university’s curricula, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings.” *Id.* at 17. The Board noted that these topics affect the very nature of the institution, and clearly fall outside the routine discharge of a professor’s duties. *Id.* The Board reasoned that “they effectively determine the university’s ‘product’ and the terms upon which that ‘product’ is offered to students.” *Id.* Changes in these areas often affect and necessitate change to the university’s organization and structure, and thus will involve consideration of organizational and structural changes. *Id.*

For enrollment management, the Board focuses on the “size, scope, and make-up of the university’s student body.” *Id.* The Board noted that “the targeted student body is a fundamental choice for any university, and the ability to attract and retain those students affects policies throughout the university.” *Id.* Like with customers in the industrial setting, the Board highlighted that without students, a university cannot sustain itself. *Id.*

⁶ To the extent that the College argues that the Hearing Officer erred by initially stating that *Yeshiva* applied and then referred to *PLU* during the hearing, I do not find any such error. As indicated herein, *PLU* further refined the legal standard under *Yeshiva*. Accordingly, reference to both cases was appropriate and the hearing officer did not err.

For finances, the Board found that “the power to control or make effect recommendations regarding financial decisions – both income and expenditure – is one of the hallmarks of managerial control across all industries.” *Id.* (citing *General Dynamics Corp.*, 213 NLRB 851, 860 (1974)). The Board focuses its inquiry on what the school charges for its services, such as determining net tuition. *Id.*

With regard to secondary decision making, as for academic policy, the Board highlighted that “decision-making in this area covers topics such as teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.” *Id.*

For personnel policy and decisions, the Board found that “faculty control over personnel policy, including hiring, promotion, tenure, leave, and dismissal, goes beyond an individual faculty member’s classroom or research project in that it effects the makeup of the academy.” *Id.* at 18. Thus, the Board reasons that “it potentially implicates the divided loyalty concern that underlies the managerial exception.” *Id.*

The Board in *PLU* stated that, when a committee controls action in a particular decision-making area, the party asserting that the faculty are managers must prove that faculty constitute a majority of the committee. *Id.*, slip op. at 18. Furthermore, the Board emphasized the importance of scrutinizing the specific employment relationship at issue: “Our inquiry, therefore, must include an examination of whether the nature of the employment in issue prevents those affected from helping shape the academy as a whole at their individual institutions.” *Id.*, slip op. at 20.

In determining managerial status, the Board held that for decisions in a particular area to be attributed to faculty, first, the party asserting managerial status must demonstrate, with specific evidence of actual exercise of the authority, that the authority is actual, not theoretical. *Id.*, slip op. at 18. Second, to count as “effective,” recommendations must almost always be followed by the university administration. *Id.* The Board stated further that without evidence that faculty recommendations routinely become operative without independent review by administration it will not consider these recommendations effective. *Id.* See also *University of Great Falls*, 325 NLRB 83, 95-96 (1997) (finding that faculty are not managerial where record is replete with evidence of committee recommendations but vague or silent as to whether recommendations generally and routinely were approved by the administration or whether those recommendations were independently reviewed and evaluated by higher-ranking administrators). Finally, “an evaluation of whether faculty actually exercise control or make effective recommendations requires [the Board’s] inquiry into both the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure-eligible vs. nontenure eligible; regular vs. contingent).” *Id.*, slip op. at 19.

2. Application

I find that that the College has met its burden of establishing that Unit faculty exercise managerial authority with regard to academic programs, academic policy, and personnel policy and decisions. Although the Board in *PLU* establishes the primary and secondary weight attributed to the decision-making areas discussed in the decision, the decision does not provide clarity as to which types or numbers of factors a party must prove in order to meet its burden. In light of the record as a whole and the standard set forth in *PLU*, I find that the College has met its burden of proving that the Unit faculty are managers within the meaning of the Act.

For the primary areas of decision-making under *PLU*, the record only establishes that Unit faculty exercise decision-making authority over academic programs. In this area, the record evidence shows that Unit faculty, through relevant committees and the Assembly, make decisions involving the College's curricula, major, minor, and certificate offerings, and the requirements for completing those offerings. The Curriculum Committee, which is 50 percent Unit faculty, exercises primary authority over curricula, major, minor, and certificate offerings, in as much as changes to any of these offerings originate with the committee and then go to the Assembly for approval. To the extent that evidence indicates that the Board, in very limited circumstances, has made decisions contrary to the committee's recommendations regarding certain majors, this does not override the faculty committee and Assembly's extensive role in the process. This is especially true given that the Curriculum Committee also has the authority to add, and has in fact added, certificate programs to the College's offerings with only approval by the Assembly, without needing further approval by the Board. Given that certificate programs attract new non-degree students, and thus additional tuition revenues to the College, this weighs particularly in favor of finding managerial status. Moreover, the Core Committee, which is majority faculty, approves courses for and makes recommendations for changes regarding the core curriculum required of all students at the College, of which only major changes require Assembly or Board approval. In sum, I find that the area of academic programs weighs in favor of finding that the College has met its burden of proving Unit faculty's managerial status.

With regard to enrollment management, the evidence does not show that Unit faculty exercise decision-making authority over the size, scope, or make-up of the College's student body. Rather, the admissions department determines whether students are admitted. To the extent that the College argues that Unit faculty involvement in advanced placement decisions, merit scholarship application review, and the size of specific departments demonstrates Unit faculty authority over enrollment management, such arguments are misplaced, as these types of decisions do not go to the scope of "enrollment management" as defined by the Board in *PLU*. In sum, I find that the College has failed to establish that Unit faculty exercise effective decision-making authority over enrollment management, and that this factor weighs against finding that the College has met its burden of proving Unit faculty's managerial status.

The record similarly fails to establish that Unit faculty exercise effective decision-making power over financial decisions, either income or expenditure. Significantly, the record is clear that the Board, not Unit faculty, decides tuition rates – what the College charges for its services. While it is true that department chairs, who are in the petitioned-for Unit, do maintain

autonomous control over their respective departments' discretionary budgets, the several thousand dollars in these discretionary budgets pale in comparison to both the departmental budgets as a whole and to the College's approximately \$34 million yearly budget. Similarly, the \$80,000 designated funds for faculty training and used at the discretion of a faculty committee, in the context of the entire budget, fail to establish managerial authority. As such, I find that any control over discretionary budgets and faculty training budgets are at most *de minimus* and do not weigh in favor of finding managerial status.

For the secondary decision-making making areas, the College has established that Unit faculty exercise decision-making authority in the areas of both academic policy and personnel policy and decisions. As to academic policy, the record shows that Unit faculty make decisions regarding teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy. The Handbook, which must be approved by the Assembly and the Board, governs the broader protocol for the decision-making areas under academic policy. Moreover, the Curriculum Committee, which is 50 percent faculty, handles the College's syllabus policy. The faculty-majority IRB, with almost no administrative oversight, reviews faculty research methods and ensures that research that may involve human participants is conducted in an ethical and moral manner, thus dictating research methods. Finally, the Policy Committee, although minority faculty, makes major recommendations that the Assembly, which is vast majority faculty, must approve – most notably the attendance policy, the academic integrity policy, and the waiver of core requirements for students already in possession of the bachelor's degree. Given the absence of Board oversight in the approval of much of these academic policies, I find that Assembly involvement and approval weighs in favor of finding managerial status. In sum, I find that academic policy weighs in favor of finding that the College has met its burden of establishing that Unit faculty are managers within the meaning of the Act.

As to personnel policy and decisions, Unit faculty possess and exercise decision-making authority regarding hiring, promotion, tenure, and leave. As to hiring, Unit faculty exercise significant control over hiring, as the department chairs head department-level hiring committees made up of Unit faculty, who serve as the primary hiring mechanism for new Unit faculty. Unit faculty also exercise significant control over the hiring and termination of adjuncts, and can elect not to renew adjunct contracts without approval or oversight from the College; this weighs in favor of finding managerial status. The overwhelming authority of the faculty-majority Rank and Tenure Committee over evaluation and tenure decisions for Unit faculty also weighs heavily in favor of finding managerial status. Although tenure decisions receive approval from the President and ultimately the Board, the record evidence clearly establishes that the vast majority of the committee's recommendations as to tenure are followed and that at least the President conducts no independent review. Similarly, the faculty-majority Faculty Development Committee makes decisions regarding sabbatical for Unit faculty, which is a form of leave, that the President adopts *pro forma* without any independent review. As to dismissal, though it appears that the Rank and Tenure Committee can review dismissal appeals, the record contains insufficient evidence to show the nature and extent to which such protocols are used, let alone the extent to which any committee recommendations are followed by the Board. The overwhelming record evidence establishes that Unit faculty exercise effective decision-making

authority over personnel policy and decisions, and thus this factor weighs in favor of finding that the College has met its burden of proving managerial status.

As a final step in analyzing whether Unit faculty effectively recommend decisions in the primary and secondary decision-making areas set forth in *PLU*, I must examine the structure of decision-making at the College and where the Unit faculty fit into that structure. I find that this also weighs in favor of finding that the College met its burden of proving the managerial status of the Unit faculty. Significantly, the petitioned-for Unit includes only tenured and tenure-track faculty, not adjunct or contingent faculty. All of the Unit faculty participate in committees and the Assembly, which play a crucial role in the College's decision-making structure. The nature of this role is codified in the Handbook, which is a governing document over whose content Unit faculty also exercise some degree of control.

In sum, I find that the College has met its burden of proving that Unit faculty are managers within the meaning of the Act, as defined in the Board's *PLU* decision.

IV. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude that the College is not subject to the Board's jurisdiction under *PLU* in that the petitioned-for Unit faculty are subject to discharge for "continued serious disrespect or disregard for the Catholic character or mission" of the College, and thus that I must dismiss the instant petition. Moreover, I find that even assuming *arguendo* the College were subject to the Board's jurisdiction, I would nevertheless dismiss the instant petition as the Unit faculty are managers within the meaning of the Act.

Additionally, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act.⁷
3. The Petitioner is a labor organization within the meaning of § 2(5) of the Act and claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of § 9(c)(1) and §§ 2(6) and (7) of the Act.

⁷ The parties stipulated and I find that the Employer is a State of Montana public benefit corporation, with a main campus located in Helena, Montana, and is a private, non-profit institution of higher education. During the last twelve months, a representative period of time, the Employer received gross revenues valued in excess of \$1,000,000. During the same period, the Employer received goods valued in excess of \$50,000 from points directly outside the State of Montana.

V. ORDER

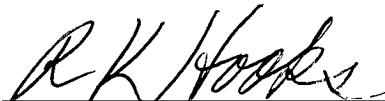
IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Pursuant to § 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. The request for review must conform to the requirements of § 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: This 19th day of January, 2016



RONALD K. HOOKS
REGIONAL DIRECTOR
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